THE AMENDMENT OF THE FEDERAL CONSTITUTION[1]

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THE subject of our discussion to-day is the adaptation of written constitutions to changing economic and social conditions. One method of such adaptation, namely, by judicial interpretation of existing provisions, has been treated by the previous speaker. It is my purpose to consider a different method—alteration by the process of formal amendment, in the particular case of the Federal Constitution. I am not, however, concerned with desirable changes in the substantive part of the constitution, but I wish to direct attention to the procedure for making such changes—to the amending clause itself.

When the members of the Federal Convention of 1787 had to consider what provision should be made for remedying defects in their work which they expected time and experience to reveal, there were practically no models or precedents to guide them. The state constitutions offered little that was suggestive. The Articles of Confederation were virtually unamendable, requiring agreement in Congress and confirmation by the legislatures of every state in the Union;[2] in fact, it was this very condition that made necessary the calling of a convention and the adoption of the new constitution by revolutionary methods.

The delegates to the Federal Convention had, therefore, to find a solution to a new problem and the account of the debates in Madison's journal shows plainly their uncertainty as to the form it should take. Randolph's resolution on this subject,

[1] Read at the meeting of the Academy of Political Science, Oct. 26, 1912.

[2] Art. xiii. It is interesting to note, however, that Franklin's draft of articles of confederation (1775) required amendments submitted by Congress to be approved by a *majority* of the colony assemblies. *Cf.* Watson, *Constitution*, pp. 1302–1303.

as adopted, merely expressed the sense of the convention that amendments should be made whenever necessary, the original qualification, "without requiring the consent of the national legislature," having been dropped. We are told, however, that "several members did not see the necessity of the resolution at all."[1] The Pinckney plan provided for the calling of a convention on application of two-thirds of the state legislatures and for the proposal of amendments by Congress on a two-thirds vote in each house, ratification in either case requiring the agreement of two-thirds of the state legislatures.[2] The committee of detail, to which these two drafts were referred, reported a rather indefinite clause. It merely provided that on the application of the legislatures of two-thirds of the states for an amendment Congress should call a convention for that purpose.[3] This was agreed to, but on the motion to reconsider was criticized by Gerry, on the ground that it left the state governments at the mercy of a majority of the convention; by Hamilton, because it was inadequate in not providing for the proposal of amendments by Congress, which he said would be the first to perceive, and would be most sensible to, the necessity for them; by Madison, on the ground of its vagueness. To meet these objections, the amendment offered by Sherman gave Congress the power to propose amendments without any proviso for a two-thirds majority but required the consent of all the states for ratification. As this repeated the mistake made in the Articles of Confederation Wilson of Pennsylvania proposed to cut down the requirement for ratification to two-thirds of the states, but this motion was lost by a vote of six to five. Then a compromise was effected on the present basis of three-fourths. At this stage Madison proposed and Hamilton seconded a substitute clause differing only from that which was finally adopted in providing that the application of two-thirds of the legislatures should be mandatory to Congress for the proposal of amendments instead of for calling a convention, and this was adopted

[1] *Elliot's Debates*, vol. 5, pp. 128, 157, 182.

[2] *Ibid.* vol. 5, pp. 132.

[3] *Ibid.* vol. 5, pp. 381, 498.

by nine to one.[1] In this form it went to the committee on style and arrangement, and was reported with only slight verbal change. In the further discussion the proposed clause was criticized on the ground that the amendatory power was left too exclusively to Congress, and the provision for a convention was accordingly inserted. Subsequent motions to require ratification by all the states, to strike out the alternative provision for ratification by conventions, and to provide for a second general convention were negatived, and the construction of the present unwieldy and cumbersome machinery was complete.[2]

The few references to this clause in the state conventions which followed, particularly the remarks of Mr. Iredell in North Carolina, show clearly that it was the expectation of the framers that the procedure provided would be found easily workable when the need arose.[3] On the contrary it has proved, as is well known, to be an almost insurmountable obstacle in the way of securing either the proposal or the adoption of amendments very widely approved by the people.

The first ten amendments, known as the bill of rights, were rather additions to the constitution than alterations of it. They were really initiated by the state conventions, being practically the conditions precedent to ratification. The operation of the machinery, therefore, presented no difficulty in this case. The time required to make them part of the constitution was one year and eight months from the time of proposal by Congress.[4]

The eleventh amendment, which arose from a difficulty created by a judicial decision (Chisholm *v.* Georgia,) was of minor interest, and was not ratified by the necessary number of states until three years and eight months after it was submitted.[4]

The twelfth amendment, providing for a change in the political machinery for the election of president, arising out of the contest between Jefferson and Burr, and being urgent because a new election was approaching, was ratified in ten months.[5]

[1] *Elliot's Debates*, vol. 5, pp. 530–532.

[2] *Ibid.* pp. 551–553.

[3] *Ibid.* vol. 4, p. 176. See also *Federalist*, no. 85.

[4] Watson, *Constitution*, vol. 2, p. 1311.

[5] Ames, H. V., *Proposed amendments to the constitution*, *Ann. Rep. Am. Hist. Assoc.*, 1896, vol. 2, p. 79.

Then followed a period of over half a century, during which were introduced upward of four hundred amendments covering a wide field of subjects. Six of these were passed by the requisite two-thirds vote in only one house of Congress; one relating to titles of nobility was submitted to the state legislatures and lacked only the vote of one state of being adopted.[1]

It was not, however, until the sixties, when fundamental economic difficulties had to be met, that the real test came and the vital weakness of the constitution in its procedure for amendment was demonstrated. The civil war followed, and after its conclusion the thirteenth, fourteenth and fifteenth amendments, to define the rights of a new body injected into the citizenship of the republic, were added to the constitution by force of the superior power of the victors in the struggle. From that time no suggested amendment was able to secure the necessary two-thirds majority in both houses of Congress until the year 1909, a period of forty years.

Each of the two amendments recently proposed to the state legislatures has peculiar features and has been attended by special circumstances, making its submission to the states finally possible. The income-tax amendment was rendered necessary by a flagrant abuse of the judicial power to review acts of Congress which had been rankling in the public mind for fifteen years and which forbade the establishment of a national system of taxation on a just and equitable basis. As the result of a particular parliamentary situation, a Republican President and majority in both houses of Congress found themselves in agreement with the Democratic minority. It was practically a case of proposing a constitutional amendment by unanimous consent. The amendment has, however, been pending now for three years and three months and still requires ratification by two more states for its adoption.

The proposed amendment for choice of United States Senators by popular vote in each state, submitted this year, had been the subject of numerous resolutions introduced in Congress since 1826 and in some form had secured the requisite two-thirds majority in the House of Representatives in each Congress

[1] Ames, H. V., *Proposed amendments to the constitution*, pp. 19–22.

from the fifty-second.[1] A large majority of the state legislatures had repeatedly adopted resolutions recommending this amendment. These were finally taking the form of applications for a convention to propose amendments, and were rapidly approaching the number of two-thirds of the states which would have required Congress to call such a convention. Furthermore, the present constitutional method, which has led to prolonged deadlocks, to the corruption of legislatures, and to the election of men subservient to special interests, had been largely set aside in many states through direct-primary laws, particularly where the Oregon system had been adopted. This growing pressure of public demand for a more democratic method finally reduced the opposing minority in the Senate, the body directly affected, to such a point that further resistance was ineffectual.

Such, in brief, is the history of this ponderous piece of constitutional machinery difficult to set in motion and slow and uncertain in its operation, fully justifying its vigorous condemnation by eminent publicists at home and abroad. Certain other serious objections to it are based (1) on the very unequal weight which it gives to public opinion in different parts of the country, and (2) on the preponderating influence given to the state governments as against the people.

Under the first of these heads, without going into any elaborate statistical analysis, it is sufficient to point out that, according to the last census, the population of the state of New York is greater than that of the eighteen smallest states, yet in finally determining constitutional issues the vote of each of the latter has equal weight with that of New York. Or in the extreme case of the largest and smallest of the states, in point of population, we find that public opinion in Nevada on any amendment submitted for ratification has a weight more than 100 times as great per capita as public opinion in this state. Furthermore, the legislatures of the Pacific and mountain states, with those of two adjacent states, comprising not more than 10 % of the population in all, have the power to block a change in

[1] The proposition was made in the Federal Convention, but received the support of only one state, *viz.*, Pennsylvania. *Elliot's Debates*, vol. 5, pp. 138, 167–170.

the constitution desired by all the other states in the East, South and Middle West, representing 90 % of the population. The undue influence of the states as states, regardless of their population, is also shown in the arrangement by which the states, indirectly through their equal representation in the Senate and directly as units in the ratification process, are consulted twice in the course of the amending procedure, whereas the people of the states are consulted only once, and indirectly, through their representation in the lower house of Congress on the basis of population. This predominance of state influence is a survival from the old Articles of Confederation and is really at variance with the idea of the sovereignty of the people of the United States expressed in the preamble of the constitution.

In looking for suggestions for a better method of amendment and one more in accord with modern democratic ideas, we naturally turn in the first place to a consideration of the experience of the several states of the Union and the modifications that have been made in their constitutions during the last century and a quarter.[1] This shows that, in contrast with the Federal Constitution, the various state constitutions have in the course of time become more easily adjustable to changing conditions and closer approximations to the will of the people through alteration of their amending clauses:

(1) to make the submission of amendments less difficult, by providing for their proposal in one or more of the following ways: (a) by the action of one legislature instead of two successive legislatures; (b) by the ordinary legislative majority instead of by a special majority (*e. g.*, two-thirds); and (c) by initiative petition of a certain percentage of the voters.

(2) to provide for ratification by direct vote of the electors, a method which now prevails in every state except Delaware.

As any amendment of the present procedure for the alteration of the federal constitution will have to receive the approval of three-fourths of the state legislatures for its adoption, it is clear that such a proposal must be in conformity with the ideas

[1] A full discussion may be found in Dodd, W. F., *Revision and amendment of state constitutions*, pp. 118 ff.

which have come to prevail in the several states regarding constitutional changes and with the methods they have become accustomed to employ to effect them.[1]

We have, however, to remember that we are dealing with the organic law of a federal government as distinguished from that of a single state. It is, therefore, desirable to inquire into the experience of foreign countries which have had to face the problem of framing a federal constitution. Fortunately there are two such countries in which instructive models are available for our investigation, namely, Switzerland and the Commonwealth of Australia. Each of these had the advantage of being able to study American experience, both federal and state, with regard to the process of amendment.

Under the Swiss system, originally adopted in 1848 and modified in 1874 and again in 1891, amendments may be proposed either by the ordinary legislative process or by initiative petition of 50,000 voters in the form of general suggestions or of completed bills. General suggestions are elaborated by the Federal Assembly on its agreement thereto or after the question has first been submitted to the people. In the case of completed bills, the Federal Assembly may submit with them alternative proposals which it recommends. Total revision may be undertaken by the Federal Assembly at any time when both councils are in agreement; but in case of disagreement, or when 50,000 Swiss voters demand such revision, the question is submitted first to a popular vote and if a majority of the citizens who vote pronounce in the affirmative, a new Federal Assembly is elected for this purpose. Proposed changes when formulated are submitted to referendum vote and take effect when adopted

[1] A test of opinion in Congress on this matter was recently afforded in connection with the admission of New Mexico and Arizona to statehood. By the joint resolution of Aug. 21, 1911, New Mexico was required, as a condition precedent to admission, to alter the amending clause of its proposed constitution (61st Cong., 3d sess., house doc. 1369, p. 38) so as to reduce the requirement for the vote of the legislature in proposing amendments from two-thirds to a majority of the members of each house and for ratification, to substitute a majority of those voting on the proposition in place of a majority constituting an affirmative vote equal to at least 40 per cent of the votes cast at the election and approval by at least half the counties of the state.

by the majority of Swiss citizens voting thereon and by a majority of the cantons.[1]

Next, let us consider the amending clause of the Australian constitution which went into effect in 1901. Though formally enacted by the Imperial Parliament,[2] this important instrument was the result of the deliberations of two conventions of delegates from the separate colonies, of which the first met in 1891 and the second held its sessions over a period of three years, 1897 to 1899. The reports of the debates in these conventions are documents of exceptional importance for the study of our own constitutional problems, not only because we see in them a kindred people with similar traditions grappling afresh with the same questions, but also because American experience is constantly referred to and carefully weighed and analyzed.

The draft of the bill adopted by the 1891 convention[3] provided that any law for the alteration of the constitution must be passed by an absolute majority of both houses and be referred to conventions in the several states and for adoption, to be submitted to the Governor-General for the Queen's assent, required approval by the conventions of a majority of the states, subject to the condition that the people of these states were also a majority of the people of the commonwealth. The draft of this clause adopted by the second convention eight years later, which became the final form, shows two significant changes—one making the initiation of amendments easier, the other substituting a popular referendum for ratification by conventions.[4] The requirement for proposal of amendments became an absolute majority in each house or, in case of disagreement, an absolute majority in one house given twice, the second time after

[1] Swiss Federal Constitution, Arts. 118–123. A full account of the history of this procedure is given in Borgeaud's *Adoption and amendment of constitutions in Europe and America* (tr. by C. D. Hazen, N. Y., 1895) pp. 291–332.

[2] Commonwealth of Australia Constitution Act, 63 & 64 Vict. ch. 12.

[3] National Australasian Convention, Sydney, 1891, *Official record of the proceedings and debates*, p. clxxxviii; debated, pp. 428–434.

[4] National Australasian Convention, Adelaide, 1897, *Official report of the debates*, pp. 1020–1030, 1204–1209; Australasian Federal Convention, Melbourne, 1898, *Official record of the debates* (third session), vol. 1, pp. 715–772.

three months' interval, plus submission on both occasions to the other house. Every such law is then to be submitted (after two but before six months) to the voters of every state, requiring for adoption the approval of the people in a majority of states and of a majority of the people voting over the whole Commonwealth.

It must be remembered, however, in endeavoring to adapt such a procedure to our own circumstances, that in Australia there exist two safeguards which are wanting here, namely responsible government and the power of disallowance which may be exercised by the British government in case of need.

The last stage of our inquiry is to consider the modifications of article 5 that have been proposed. We have seen that the Articles of Confederation did not specify any special majority in Congress for the proposal of amendments and that the provision for a two-thirds vote was not formulated until a late stage in the proceedings of the Federal Convention when Madison and Hamilton presented their substitute clause; also, that the motion to make two-thirds of the states the number necessary and sufficient for ratification was lost by only one vote. After the adoption of the constitution, however, no suggestion for facilitating the amending process was presented to Congress until January, 1861, when an effort was made to submit the "Crittenden Compromise" to a direct vote of the people. Such a plebiscite would have been advisory only but it is interesting to note that such a proposal was made at this time of great stress when the machinery provided in the constitution proved unworkable. A similar proposition was also offered when the fifteenth amendment was under consideration.

The first actual proposal to establish an easier method of amendment was, however, contained in the original draft of the resolution for the abolition of slavery, as introduced by Senator Henderson of Missouri in January, 1864, a substitute for which ultimately became the thirteenth amendment. The clause, which was dropped in committee, provided that whenever a majority of the members elected to each house, or a convention called on the application of the legislatures of a majority of the several states, should propose amendments, these in either case

should be valid when ratified by the legislatures of or conventions in two-thirds of the several states, as Congress should direct. The next resolution for a new amending clause was introduced in 1873 by Mr. Porter of Virginia. It provided that Congress, whenever three-fifths of both houses deem it necessary, may propose amendments to the constitution, or may call a convention for proposing amendments and revising the constitution, and shall be required to call such a convention on the application of the legislatures of any number of states, embracing three-fifths of the enumerated population of the several states. Amendments proposed by either of these methods were to be valid when approved and ratified by a majority of the electors in the several states voting thereon, and qualified to vote for Representatives in Congress.[1]

Of later proposals three are of special interest. Professor J. W. Burgess in his *Political Science and Comparative Constitutional Law*[2] (1893) suggested the following procedure for amendment of the Federal Constitution: proposal of amendments in two successive Congresses by the two houses in joint session and by simple majority vote; submission to the state legislatures for ratification by the houses thereof, also acting in joint assembly and resolving by simple majority vote; in counting the votes of the legislatures each state should have the same weight as is given to it in the electoral college and an absolute majority of all the votes to which all the states were entitled should be necessary and sufficient for ratification.

Professor Munroe Smith in his recent discussion of this subject[3] has pointed out that we have to consider not only what more workable method of amendment seems best adapted to our dual system of government but also what changes in the amending clause would probably stand the best chance of securing the assent of three-fourths of the states. He, therefore, suggests as objections to the Burgess plan that, on the one hand,

[1] Ames, H. V. *Proposed amendments to the constitution*, pp. 292–293.

[2] Vol. I, p. 152.

[3] "Shall we make our constitution flexible?" in *North American Review*, vol. 194, pp. 657–673 (Nov. 1911).

it would be felt that if weighted at all the votes of the states should be according to population and, on the other hand, that the smaller states would demand equality with the larger and would not approve the provision for a joint assembly of Congress, as this would destroy the influence of the equal representation of the states in the Senate. To meet these difficulties he would substitute as the provisions of a new amending clause

"proposal of amendments by the majority vote of both houses in two successive Congresses; submission of such proposals to the legislatures of the several states or to conventions in the several states or directly to the voters in each of the states, as one or another of these modes of ratification may be proposed by Congress; and ratification of proposals by a majority of the states, provided that the ratifying states contain, according to the last preceding enumeration, a majority of the total population of all the states."

This plan is better in every way than any previous proposal and would go a long way towards providing an efficient amending procedure. As, however, the proposal of constitutional amendments by repeated vote in two successive legislatures has been largely abandoned in the case of the state constitutions in favor of action by a single legislature or other methods, it does not seem necessary or desirable to introduce it at this date into the amending clause of the Federal Constitution without good and sufficient cause. The reason assigned in this case is that it would lead to proposals of superior precision being submitted for ratification. But it seems probable that this result could be attained more directly and effectively by the establishment of the proposed legislative drafting bureau for Congress. In cases of disagreement between the two houses of Congress on a matter of constitutional change it might well be provided that amendments could be proposed by majority vote of *one* house in two successive Congresses, as an alternative to proposal by majority vote of both houses in one Congress.

With regard to the ratification process it may be remarked that the object of this is to take the sense of the sovereign people on the amendments submitted. The interposition of representative bodies, either the ordinary legislatures or conventions

elected *ad hoc*, without power to amend the proposals but merely authorized to ratify or reject them, is little more than an indirect and unsatisfactory method of counting the votes for and against. In competition with the method of the direct vote of the electors which the people are accustomed to use in amending state constitutions, it is more than probable that ratification by the state legislatures or by conventions would go to the wall, just as the convention method, though theoretically the better way, has never been chosen by Congress in submitting amendments on account of the greater practical advantages of ratification by the state legislatures. Furthermore, the plan makes no provision for the proposal of amendments on the initiative of the states. In view of the fact that the state governments are becoming laboratories for trying out political inventions, it is to be expected that some important devices for a better system of government, including particularly methods of regulating industry and commerce, will be discovered in them. It is important that the new machinery for the proposal of amendments should provide a means of presenting these for general adoption throughout the country.

All of these specifications for a new amending clause are met in the joint resolution introduced into Congress by Senator LaFollette towards the close of the last session, which presents the following:

Article XVIII. The Congress, whenever an absolute majority of both houses shall deem it necessary, or on application of ten states by resolution adopted in each by the legislature thereof or by a majority of the electors voting thereon, shall propose amendments to this constitution to be submitted in each of the several states to the electors qualified to vote for the election of Representatives, and the vote shall be taken at the next ensuing election of Representatives in such manner as the Congress prescribes. And if in a majority of the states a majority of the electors voting approve the proposed amendments, and if a majority of all the electors voting also approve the proposed amendments, they shall be valid, to all intents and purposes, as part of this constitution.

This proposal, it will be seen, embodies and adapts the prin-

ciples that have been tested both in the several states and in the foreign countries which have been considered. One objection will perhaps be made to it, namely, that it does not take account of the fact that in some states women are entitled to vote as well as men and that these states would add a disproportionate number to the total vote throughout the country. A similar situation confronted the framers of the Australian constitution and they met the difficulty by providing that "until the qualification of electors of members of the House of Representatives becomes uniform throughout the commonwealth only one-half the votes for and against the proposed law shall be counted in any state in which adult suffrage prevails." This clause, however, proved to be entirely unnecessary because before the first proposed amendments to the Australian constitution were submitted the enfranchisement of women had been achieved in every state. On account of the recent remarkable development of the equal-suffrage movement in the United States it seems likely that by the time any new amending clause shall have received the approval of two-thirds of both houses of Congress and of the legislatures of three-fourths of the states this difficulty will have vanished. A temporary provision to meet it would not, however, interfere with the general plan of Senator LaFollette's resolution.

As this proposition provides, with adequate safeguards, sufficient facility for the proposal of amendments which are widely supported and for their incorporation into the constitution when a majority of the states and of the whole electorate have expressed their approval, it is worthy of the earnest consideration of those who, in the words of Professor Munroe Smith, have "realized that the first article in any sincerely intended progressive program must be the amendment of the amending clause of the Federal Constitution."